

Selected Documents from Claim File

Claim No. LRF-1998-0615-01

CLAIM PAYMENT CHECKLIST

To be used for claims arising prior to 07/01/98

I. General Information

LRF Claim No: <u>LRF-1998-0615-01</u>	Related Claim Nos: <u>None</u>
1. Claimant: Name: <u>Hansen Insulation Inc</u> Address: <u>175 South Geneva Road</u> City, State, Zip: <u>Lindon, Utah 84042</u> Telephone: <u>(801) 785-4800</u> DOPL/LRF No: <u>95-242517 -5501 (8/24/95)</u>	
2. Claimant's Legal Counsel: Name/Law Firm: <u>Howard Chuntz,</u> Address: <u>1149 West Center Street</u> City, State, Zip: <u>Orem, Utah 84057</u> Telephone: <u>(801) 222-9700</u>	
3. Non-Paying Party/Permissive Party: (Entered Appearance <u>XX</u> Yes <u> </u> No) Name: <u>Robert H Warren Construction</u> Address: <u>756 South 400 West</u> ALS: <u>644 North 450 West</u> City, State, Zip: <u>Provo, Utah 84601</u> <u>Orem, UT 84057</u> Telephone: <u>(801) 225-2057</u> DOPL No: <u>96-320110-5501 (4/2/96)</u>	
4. Non-Paying Party/Permissive Party's Legal Counsel: Name/Law Firm: <u>Robert W. Fugal, Bird & Fugal</u> Address: <u>384 East 720 South #201</u> City, State, Zip: <u>Orem, Utah 84058</u> Telephone: <u>(801) 426-4700</u>	
5. Original Contractor: Name: <u>Robert H. Warren Construction</u> Address: <u>756 South 400 West</u> ALS: <u>644 North 450 West</u> City, State, Zip: <u>Provo, Utah 84601</u> <u>Orem, UT 84057</u> Telephone: <u>(801) 225-2057</u> DOPL No: <u>96-320110-5501 (4/2/96)</u>	
6. Amount claimed: <u>\$3,713.32</u>	
7. Owner: Name: <u>John Allen</u> Address: <u>883 East 780 South</u> City, State, Zip: <u>Spanish Fork, Utah 84660</u> Telephone: <u>Unknown</u>	

8. Subsequent Owner: Name: <u>None</u> Address: _____ City, State, Zip: _____ Telephone: _____	Date: _____
9. Owner-Occupied Residence: Address/Location: <u>883 East 780 South, Spanish Fork, Utah</u> Legal Description: <u>Commencing 10 links North of the Northeast Corner of the Northeast Quarter of Section 30, Township 8 South Range 3 East, Salt Lake Base and Meridian Thence South 4.98 chains and 10 links; thence West 19.75 chains; thence South 8.3 chains; thence West 26.0 links; thence North 13.28 chains; thence East 20.0 chains to the point of beginning. ALSO: Commencing at the Southeast Corner of Section 19, Township & South, Range 3 East, Salt Lake Base and Meridian; thence North 1.94 chains; thence West 1170.0 feet; thence south 100.0 feet; thence West 150.0 feet; thence South 28.04 feet; thence East 20.0 chains to the point of beginning. Together with 21 shares of East Bench Irrigation water and 25 shares of Strawberry Irrigation water.</u>	
10. Claim Classification: <u>XX</u> Formal <u> </u> Informal	

II. Claim Processing Information

Initial Claim Processing -- All Claims:	Received	Forwarded
Front Desk	6/15/98	6/19/98
LRF Specialist--set up file, notice of filing, CRIS entry	6/19/98	6/26/98
Permissive Party response Deadline: <u>July 15, 1998</u>	06/15/98	07/10/98
LRF Specialist/Claims Examiner--screening, c/d letter Reason(s) for conditional denial: _____	06/15/98	08/10/98
LRF Coordinator/Claims Examiner--review	08/10/98	09/25/98
LRF Coordinator/Claims Examiner--review	09/25/98	09/27/98
Section's Recommended Disposition – ALL CLAIMS: <u> </u> Approve for full payment <u> </u> Approve for partial payment <u>XX</u> Deny <u> </u> Dismiss Date: <u>09/25/98</u> Reason(s): <u>Claim was untimely filed 188 days after the non-paying party's bankruptcy filing.</u>		

FINAL ORDER -- ALL CLAIMS:

 Approve for full payment Approve for partial payment XX Deny Dismiss

Date: 09/28/98

Reason(s): Claim was untimely filed 188 days after non-paying party's bankruptcy filing.

If Order is fully or partially denied:

Reason(s) for denial: Claim was untimely filed 188 days after non-paying party's bankruptcy filing.

Appeal deadline: 10/28/98

Date request for agency review filed:

Date/Nature of Order:

III. Jurisdiction Checklist

Y/N	Inits	Date	Issue
NO	ljb	09/25/98	Is Application Jurisdictionally Sound?
YES	ljb	09/25/98	<p>A. Claimant brought civil action against the non-paying party within 180 days from the last day claimant provided qualified services, which action was to recover monies owed him for the services, or was precluded from doing so by the non-paying party's bankruptcy filing within 180 days of claimant's completion of qualified services. (38-11-204(3)(d)(i)(A) and (iv).</p> <p><u>Claimant stated that it provided qualified services from 08/06/97 through 09/27/97. (Claim file p.2) Claimant, to date, has not provided any evidence of its qualified services in the file and did not obtain a judgment on the allegations in its complaint, so there is no corroborating information in the file at this point to determine the dates of service. (Claim file as of 09/25/98) A handwritten notation on claimant's complaint states that the complaint was filed on 12/24/97. (Claim file p. 24) I called the Fourth District Court Clerk on 09/25/98 and confirmed that Civil No. 970003418 was, indeed, filed on 12/24/97. Assuming that claimant's dates of service can be corroborated as stated, the last day of service was 09/27/87, and the civil filing date was 12/24/97, 88 days later. The civil action was timely filed. It should be noted that the civil action was actually precluded by Robert Warren's prior bankruptcy filing on 12/09/97. (Claim file p. 22)</u></p>

YES	ljb	09/25/98	<p>B. If civil action filing is required, notice of commencement of action was timely filed within 30 days of claimant's filing of civil action. (38-11-204(3)(d)(i)(B))</p> <p><u>Claimant filed its civil action on 12/24/97. (A above) Claimant filed its NCA with the Division on 01/07/98, (LRF records), 14 days later. Claimant's NCA was timely filed.</u></p>
NO	ljb	09/25/98	<p>C. Claim application was timely filed within 120 days of the civil judgment or bankruptcy filing. (38-11-204(2)).</p> <p><u>No civil judgment was obtained in this case, (Fourth District Court Clerk 09/25/98), because Robert H. Warren dba Robert Warren Construction filed for bankruptcy on 12/09/97. (Claim file p. 22) The present claim was filed on 06/15/98, (LRF records), 188 days later. Because the present claim was untimely filed, the Division does not have jurisdiction to consider or pay the claim.</u></p>

VIII. Demographic Data

Source: Claimant's Demographic Questionnaire.

1. Type of business entity used by claimant: <input type="checkbox"/> Sole Proprietorship <input type="checkbox"/> Partnership <input type="checkbox"/> Joint Venture <input checked="" type="checkbox"/> Corporation <input type="checkbox"/> LLC <input type="checkbox"/> Other
2. Number of employees employed by claimant: <input type="checkbox"/> None <input type="checkbox"/> 1-4 <input type="checkbox"/> 5-9 <input type="checkbox"/> 10-19 <input type="checkbox"/> 20-49 <input type="checkbox"/> 50-99 <input checked="" type="checkbox"/> 100+
3. Claimant's gross annual revenue: <input type="checkbox"/> 0-\$9,000 <input type="checkbox"/> \$10,000-\$49,000 <input type="checkbox"/> \$50,000-\$99,000 <input type="checkbox"/> \$100,000-\$249,000 <input checked="" type="checkbox"/> \$250,000-\$499,000 <input type="checkbox"/> \$500,000-\$999,000 <input type="checkbox"/> \$1,000,000-\$4,999,000 <input type="checkbox"/> \$5,000,000+
4. Number of years claimant has been in business: <input type="checkbox"/> 0-1 <input type="checkbox"/> 2-4 <input type="checkbox"/> 5-9 <input type="checkbox"/> 10-14 <input checked="" type="checkbox"/> 15-19 <input type="checkbox"/> 20+
5. Capacity in which claimant is claiming: <input type="checkbox"/> General Contractor <input checked="" type="checkbox"/> Subcontractor <input type="checkbox"/> Supplier <input type="checkbox"/> Other _____
6. Is claimant licensed through DOPL? <input checked="" type="checkbox"/> yes <input type="checkbox"/> no
7. Type of business entity used by non-paying contractor or real estate developer, if known: <input type="checkbox"/> Sole Proprietorship <input type="checkbox"/> Partnership <input type="checkbox"/> Joint Venture <input type="checkbox"/> Corporation <input type="checkbox"/> LLC <input checked="" type="checkbox"/> Unknown
8. Number of employees employed by non-paying party, if known: <input type="checkbox"/> None <input type="checkbox"/> 1-4 <input type="checkbox"/> 5-9 <input type="checkbox"/> 10-19 <input type="checkbox"/> 20-49 <input type="checkbox"/> 50-99 <input type="checkbox"/> 100+ <input checked="" type="checkbox"/> Unknown
9. Non-paying party's gross annual revenue, if known: <input type="checkbox"/> 0-\$9,000 <input type="checkbox"/> \$10,000-\$49,000 <input type="checkbox"/> \$50,000-\$99,000 <input type="checkbox"/> \$100,000-\$249,000 <input type="checkbox"/> \$250,000-\$499,000 <input type="checkbox"/> \$500,000-\$999,000 <input type="checkbox"/> \$1,000,000-\$4,999,000 <input type="checkbox"/> \$5,000,000+ <input checked="" type="checkbox"/> Unknown
10. Number of years non-paying party has been in business, if known: <input type="checkbox"/> 0-1 <input type="checkbox"/> 2-4 <input type="checkbox"/> 5-9 <input type="checkbox"/> 10-14 <input type="checkbox"/> 15-19 <input type="checkbox"/> 20+ <input checked="" type="checkbox"/> Unknown
11. Is non-paying party licensed through DOPL? <input type="checkbox"/> yes <input type="checkbox"/> no <input checked="" type="checkbox"/> Unknown

i:\... \98061501.ana

BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE LIEN RECOVERY : **ORDER**
FUND CLAIM OF **HANSEN INSULATION,** :
INC., REGARDING THE CONSTRUCTION BY :
ROBERT H. WARREN dba WARREN : Claim No. LRF-1998-0615-01
CONSTRUCTION, BUILDERS, ON THE :
RESIDENCE OF JOHN ALLAN. :

Being apprized of all relevant facts, the Director of the Division of Occupational and Professional Licensing finds, pursuant to the requirements for a disbursement from the Lien Recovery Fund set forth in UTAH CODE ANN. § 38-11-203(3)(1998), that the claimant has not complied with the requirements of UTAH CODE ANN. § 38-11-204(1998). Specifically, the claimant has failed to timely file the present claim with the Division within 120 days of the non-paying party's bankruptcy filing, as required by UTAH CODE ANN. § 38-11-204(2)(a)(1998). The non-paying party, Robert Warren dba Warren Construction filed for Chapter 7 Bankruptcy protection on December 9, 1997. Claimant filed the present claim on June 15, 1998, 188 days later.

WHEREFORE, the Director of the Division of Occupational and Professional Licensing orders that the above-encaptioned claim is denied.

DATED this 28th day of SEPTEMBER, 1998.



J. Craig Jackson, Director

CHALLENGE AFTER DENIAL OF CLAIM:

Under the terms of UTAH ADMINISTRATIVE CODE, R156-46b-202(j) (1996), this claim has been classified by the Division as an informal proceeding. Claimant may challenge the denial of the claim by filing a request for agency review. **(Procedures regarding requests for agency review are attached with Claimant's copy of this Order).**

MAILING CERTIFICATE

I hereby certify that on the 28 day of SEPTEMBER, 1998, a true and correct copy of the foregoing Order was sent first class mail, postage prepaid, to the following:

HANSEN INSULATION INC
175 SOUTH GENEVA ROAD
LINDON UT 84042

Claimant

HOWARD CHUNTZ
1149 WEST CENTER STREET
OREM UTAH 84057

Counsel for Claimant

ROBERT H WARREN CONSTRUCTION
756 SOUTH 400 WEST
PROVO UTAH 84601

Non-Paying Party

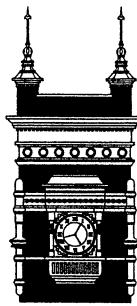
ROBERT H WARREN CONSTRUCTION
644 NORTH 450 WEST
OREM UTAH 84057

Non-Paying Party

Kathie L Schwab
Signature

1149 WEST CENTER STREET

OREM, UTAH 84057



PHONE: 222-9700 FAX: 224-9960

SALT LAKE CITY: 328-2240

DR. HOWARD CHUNTZ

ATTORNEY AT LAW

December 16, 1998

Douglas C. Borba, Executive Director
Utah Department of Commerce
160 East 300 South
P.O. Box 146701
Salt Lake City, UT 84114-6701

RE: Lien Recovery Fund Claim No. 1998-0615-01
Claimant: Hansen Insulation, Inc.
Original Contractor: Robert Warren, dba Warren Construction
Non-paying Party: Robert Warren, dba Warren Construction
Homeowner: John Allen

Dear Mr. Borba:

REQUEST FOR AGENCY REVIEW

Hansen Insulation, Inc. submits its Request for Agency Review in the above captioned matter on the basis that the requirement that filing of claim within 120 days from the date that judgment was entered is procedural and not jurisdictional and that Utah Code Annotated, Section 78-12-40, the Utah "Saving Statute" applies in this matter.

Section 78-12-40 of the Utah Code reads as follows:

If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limit either by law or contract for commencing the same shall have expired, the plaintiff . . . may commence a new action within one year after the reversal or failure.

In the present action, plaintiff timely commenced his lawsuit against the contractor in the subject matter and timely provided the Division with its Notice of Commencement of Action against the contractor. Claimant then obtained a default judgment against the contractor, but failed to file its claim with the residence lien recovery fund within 120 days of the obtaining its default judgment. In an attempt to rectify this problem, claimant had said default judgment set aside, then renewed and refiled its claim with the residence lien recovery fund. The case of C.P. v. Utah Office of Crime Victims' Reparations, 354 Utah Adv. Rep. 12 (1998) has ruled that Utah's "Saving Statute" applies to Utah Administrative Practices Acts, Judicial Review

December 16, 1998

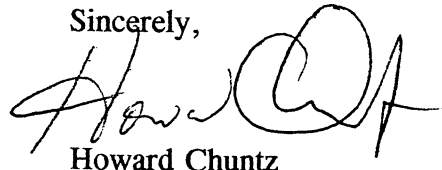
Page 2

Provisions and further ruled that "in the absence of . . . a plain expression of intent, we have generally read statutes that impose pre-conditions to filing suit as establishing only procedural hurdles to suit, hurdles that can be cleared, rather than absolute bars to suit." (Emphasis from original). That court went on to rule that the statute in question was a filing deadline, but not a definitive bar under the "Saving Statute" and that when the plaintiff therein filed her initial petition, the administrative agency was placed on notice that she intended to pursue her claim, and that her second petition was timely filed.

In a similar case, Standard Federal Savings & Loan v. Kirkbride, 821 P.2d 1136 (Utah App. 1991) found that the three month deadline for filing a deficiency judgment under Utah Code Annotated Section 57-1-32 was subject to Utah Code Annotated Section 78-12-40, and that once the primary purpose of providing notice to the appropriate party concerning the commencement of the action, the statute does not permanently bar further proceedings any time some procedural failing results.

Claimant's claim before the Residence Lien Recovery Act comes within the protection provided by the "Saving Statute" and claimant is entitled to have its claim on its merits.

Sincerely,



Howard Chuntz

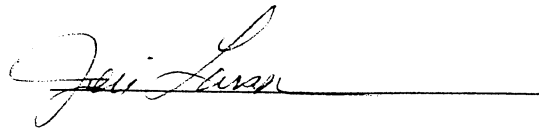
HC/jl

MAILING CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed, postage prepaid, this 16th day of December, 1998, to the following:

Robert H. Warren Construction
756 South 400 West
Provo, Utah 84601

Hansen Insulation, Inc.
175 South Geneva Rd.
Lindon, UT 84042



re re2

1149 WEST CENTER STREET
OREM, UTAH 84057



PHONE: 222-9700 FAX: 224-9960

SALT LAKE CITY: 328-2240

DR. HOWARD CHUNTZ

ATTORNEY AT LAW

October 21, 1998

RECEIVED

OCT 30 1998
DIVISION OF OCCUPATIONAL
& PROFESSIONAL LICENSING

Douglas C. Borba, Executive Director
Utah Department of Commerce
160 East 300 South/Box 146701
Salt Lake City, Utah 84114-6701

RE: Lien Recovery Fund Claim No.: 1998-0615-01
Claimant: Hansen Insulation, Inc.
Original Contractor: Robert Warren, dba Warren Construction
Non-Paying Party: Robert Warren, dba Warren Construction
Homeowner: John Allen

Dear Mr. Borba:

REQUEST FOR AGENCY REVIEW

Hansen Insulation, Inc., submits its request for agency review in the above captioned matter on the basis that the requirement that filing of a claim within 120 days of the non-paying party's bankruptcy filing conflicts with other requirements of the Lien Recovery Statute and provides for an unrealistic and unreasonable filing requirement under certain circumstances as set forth more specifically below.

FACTS

- A. Claimant's lien was filed on October 3, 1997.
- B. Non-paying party's bankruptcy was filed on December 9, 1997, without the knowledge of claimant.
- C. Claimant's Complaint against the non-paying party and the homeowner was filed on December 24, 1997, without knowledge of non-paying party's bankruptcy.
- D. Homeowner was served with said Complaint January 7, 1998.
- E. Claimant learned of non-paying party's potential bankruptcy on January 12, 1998.
- F. Claimant received homeowner's documentation supporting homeowner's assertion that homeowner was entitled to protection under the Lien Recovery Act on March 20, 1998.

G. Claimant filed a Release of Lien of homeowner's property on March 20, 1998.

H. Homeowner did not provide claimant with an Owner-Occupied Affidavit until after May 13, 1998.

A sub-contractor may not maintain a claim for recovery against the Fund unless and until it meets the requirements of 30-11-204(3) or (4) of the Utah Code. That Section requires establishment that there was a signed contract between the homeowner and contractor, that the homeowner has paid the contractor in full and that the contractor was licensed with the State of Utah. The Lien Recovery Fund also requires that claimant submit an Owner-Occupied Affidavit from the homeowner. Knowledge of these factors and documentation supporting those requirements are not readily available when the contractor has not paid a sub-contractor nor is it readily knowable even after a lawsuit has been commenced. Generally, the homeowner does not advise the sub-contractor that he/she believes that the lawsuit should be dismissed until after the complaint has been served. At that point, the homeowner is still required to provide proof in the form of documentation supporting the requirements of the Lien Recovery Act. It is not unusual for homeowners to take 30 to 90 days to obtain and deliver the required documentation. Until the sub-contractor has obtained from the homeowner all of the documentation proving that the homeowner is entitled to relief under the Lien Recovery Act, the sub-contractor has no claim against the Fund for recovery.

In the present case, the filing of bankruptcy by the original contractor does not trigger an unpaid sub-contractor's claim for recovery with the Lien Recovery Fund. Sub-contractor may still have a right to collect the sums owed it under the mechanic's lien statute unless the homeowner meets the protection requirements of the Lien Recovery Fund as set forth above.

In the present case, claimant did not have a claim until after it had received all of the documentation from the homeowner required by the Lien Recovery Fund to allow claimant to file its claim. Claimant certainly filed its claim within 120 days of that date. The requirement to file within 120 days of the contractor filing bankruptcy is arbitrary, capricious, unreasonable and unrealistic.

WHEREFORE, claimant requests that its claim be found timely filed and approved.

Sincerely,



Howard Chuntz

HC/jl

cc: Hansen Insulation, Inc.
Robert H. Warren Construction

re ltr

BEFORE THE
DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE REQUEST
FOR AGENCY REVIEW OF
HANSEN INSULATION, INC.

: **FINDINGS OF FACT,**
: **CONCLUSIONS OF LAW and**
: **RECOMMENDED ORDER**

:
: Case No. LRF 1998-0615-01

INTRODUCTION

This matter came on for hearing upon a request for agency review filed by or on behalf of Hansen Insulation, Inc. (hereafter "Petitioner") seeking to appeal an adverse action taken by the Division of Occupational and Professional Licensing (hereafter "Division") with which Petitioner is aggrieved.

STATUTES OR RULES PERMITTING OR REQUIRING REVIEW

Agency review of the Division's decision is conducted pursuant to Section 63-46b-12, Utah Code Annotated, and Rule R151-46b-12 of the Utah Administrative Code.

ISSUES REVIEWED

1. Whether Petitioner has filed an appeal upon which relief might be granted.

FINDINGS OF FACT

1. Petitioner, by and through its attorney, filed a Request for Agency Review in the above styled and numbered cause on or about December 17, 1998. Petitioner alleged that filing an application for recovery from the Residence Lien Recovery Fund (hereafter "LRF claim") within 120 days from obtaining judgment against the defaulting party is a procedural rather than jurisdictional requirement. Petitioner further alleged that it had had its default judgment against Robert Warren d/b/a Warren Construction set aside and reentered to rectify the problem and that its claim was entitled to consideration on the merits under the provisions of the Utah "Savings Statute".

2. Petitioner failed to file a copy of whatever alleged order it is attempting to appeal in this matter and furnished no supporting documentation to support its allegations.

3. This appeal is one of several that have been filed by the same attorney on behalf of this client and another client, all of which have suffered from defects of one kind or another, and in most cases from multiple fatal defects. In order to understand this matter it is necessary to attempt to unravel a near impenetrable maze of wrong turns, backtracking, dead-ends, and attempts by Petitioner to short-circuit the system rather than treading along recognized and permissible paths.

4. In presenting the facts in this matter reliance must be made solely upon the prior record in this case before the Executive Director as well as the Division's file in this matter.

5. On June 15, 1998 the Petitioner filed a LRF claim wherein the non-paying party was Robert Warren d/b/a Warren Construction ("builder") and the homeowner was John Allan.

6. On September 28, 1998 the Division denied Petitioner's LRF claim in this matter due to an untimely filing of the LRF claim more than 120 days after the defaulting builder filed for bankruptcy protection.

7. Petitioner filed a timely appeal from the Division's September 1998 LRF claim

denial alleging that the defaulting builder was sued by Petitioner on December 24, 1994 without knowledge that the builder had filed for bankruptcy on December 9, 1997, a fact which Petitioner first discovered on January 12, 1998. Petitioner did not file a LRF claim until June 15, 1998, 188 days after the filing of the bankruptcy by the builder.

8. On November 12, 1998 an Order on Review was entered by the Executive Director upholding the Division's determination that Petitioner had failed to file a timely claim upon which relief might be granted.

9. On December 17, 1998 the Petitioner filed with the Executive Director a pleading captioned "Request for Agency Review" reciting that Petitioner's failure to file its LRF claim within 120 days fell within the protection of the Utah "Savings Statute" since Petitioner had obtained a default judgment against the builder, had had the judgment set aside, and had had the default judgment against the defaulting builder reentered. Petitioner further alleged that it had refiled its LRF claim after reentry of the default judgment against the defaulting builder.

10. The Division's file reflects that Petitioner filed a pleading captioned "Petition for Judicial Review" with the Fourth District Court during December 1998 and that the Division was served a Summons in that case on January 7, 1999. The filing made in Fourth District Court requested judicial review of the Executive Director's November 12, 1998 Order on Review.

CONCLUSIONS OF LAW

1. This appeal is one of several filed by the same attorney on behalf of this Petitioner and others of his clients from denials of their LRF claims due to a failure to file a LRF claim pursuant to UTAH CODE ANN. §38-11-204(2) which provides, in part, that in order "[t]o recover from the fund, the application . . . shall be filed **no later than 120 days . . .** from the date the judgment . . . is entered; if the claimant is precluded from obtaining a judgment because the person . . . filed bankruptcy, **from the date the person filed bankruptcy . . .**" (emphasis

added). Some of these appeals are before the Executive Director for the first time while others are here after having been denied for a second time by the Division. It appears that most, if not all, of the cases are also currently pending as appeals in the Fourth District Court.

2. The instant case at bar has a unique defect not shared by any of the companion cases in that this is the second time it has been appealed to the Executive Director upon only one LRF claim denial by the Division. Unlike others of the appeals, no second claim was filed with the Division and, after a second denial, appealed again.

3. The case at bar also differs from its companion cases in that Petitioner alleged on its initial appeal that it had been prevented from filing a timely LRF claim because of a bankruptcy filing by the defaulting builder. However on the present appeal Petitioner alleges that not only had it obtained a judgment against the bankruptcy protected builder but that it had also subsequently had the default judgment set aside and reentered.

4. The case at bar shares a similarity with its sister cases in that it is being simultaneously appealed to both the Executive Director and the Fourth District Court without there having been an exhaustion of the administrative remedies provided by the Utah *Department of Commerce Administrative Procedures Act Rules* ("department rules") and the *Utah Administrative Procedures Act* ("UAPA").

5. A further shared trait between the case at bar and its companion cases is the number of defects it possesses, most if not all of which would be fatal. For the purpose of the case at bar the Executive Director will limit discussion to the attempt by Petitioner to appeal from an order which was never issued by the Division after an alleged denial by the Division of a LRF claim which was never filed.

6. Petitioner failed to file with its appeal a copy of the order for which review was requested. The simple explanation supported by the Division files - that no order had been entered and could therefore not be attached by Petitioner - will be ignored at this point. The

rules governing administrative appeals to the Executive Director had been furnished to Petitioner with the Division's September 28, 1998 order. Among other things the rules provide, in UTAH ADMIN. R151-46b-12:

(3) Content of a Request for Agency Review and Submission of the Record.

(a) The content of a request for agency review shall be in accordance with Subsection 63-46b-12(1)(b). **The request for agency review shall include a copy of the order which is the subject of the request.**

(b) A party requesting agency review shall set forth any factual or legal basis in support of that request, including adequate supporting arguments and citation to appropriate legal authority and to the relevant portions of the record developed during the adjudicative proceeding.

(c) If a party challenges a finding of fact in the order subject to review, the party must demonstrate, based on the entire record, that the finding is not supported by substantial evidence. A party challenging a legal conclusion must support their argument with citation to any relevant authority and also cite to those portions of the record which are relevant to that issue. . . .

(f) **Failure to comply with this rule may result in dismissal of the request for agency review.** (Emphasis added).

7. Although the matter of dismissal is fully within his discretion, the Executive Director has adopted a policy of dismissing out-of-hand any request for agency review which does not contain a copy of the order appealed, since there is no legitimate excuse for an improper filing when the rules are furnished to the aggrieved party by the Division along with a letter of instructions and warnings as to the procedures which must be followed in order to perfect an appeal. An even more compelling reason in this case for following this policy is that the Petitioner is represented by an attorney who has previously filed several appeals with the Executive Director and should be familiar, both by training and experience, with the proper procedures to perfect and pursue an appeal.

8. It is recommended that the general policy be suspended in the instant case as a practical matter. There is no order being appealed from so to require a copy to be attached

would be an impossibility. Instead this case must be treated as an attempt to obtain reconsideration of the Executive Director's Order on Review entered on November 12, 1998.

9. As hereinabove set out in the Statement of Facts, Petitioner filed a petition for judicial review almost simultaneously with its appeal herein in the Fourth District Court.

Obviously if this matter is properly on appeal before the Fourth District Court, a superior tribunal, it would not be subject to review here. However, there are at least two clear reasons that Petitioner's alleged appeal to the Fourth District Court cannot be considered a serious attempt to confer jurisdiction on that court.

10. The Utah *Administrative Procedures Act* UTAH CODE ANN. §63-46b-14(3)(a) provides that a petition for judicial review of a final agency action must be filed within 30 days of the date of the issuance of the adverse decision. The petition for judicial review of the November 12, 1998 Order on Review was not filed with the court within the 30 day period and is outside of the appeal period for a judicial review. Being untimely filed, the attempted petitioner for judicial review will have to be dismissed by the Fourth District Court. *Maverik Country Stores, Inc. v. Industrial Comm'n et al.*, 860 P.2d 944 (Utah App. 1993).

11. Assuming, for the sake of argument, that Petitioner actually believes it has filed a valid matter before the Executive Director for consideration, then any appeal to a court of law prior to exhaustion of all administrative remedies would be premature. It is well settled in the law that all administrative remedies must be exhausted before a judicial action may be initiated. This principle is mirrored in UAPA at UTAH CODE ANN. §63-46b-14(2) which provides that, except for certain enumerated exceptions not applicable herein, "a party may seek judicial review only after exhausting all administrative remedies available" Petitioner has cited no authority to the effect that an aggrieved party may unilaterally choose to waive its available administrative remedies and proceed to a judicial appeal.

12. Having dispensed with any notion that Petitioner might have a sustainable appeal

in Fourth District Court which might impede a consideration herein, the next question requiring an answer is whether Petitioner has filed an appeal to the Executive Director upon which relief might be granted. For at least two reasons, Petitioner has not filed a valid appeal:

a. the only order by the Division in this case was entered on September 28, 1998, and is therefore well beyond the statutory and jurisdictional 30 day period for filing an appeal with the Executive Director [UTAH CODE ANN. §63-46b-12(1)(a) and UTAH ADMIN. R151-46b-12(1)]; and

b. This exact same case has previously been before the Executive Director on appeal and a final order was entered on November 12, 1998. Since this matter has previously been considered on appeal, this new appeal of the same case would be barred by the doctrine of *res judicata*.

13. Petitioner has captioned his pleading in this appeal as a request for agency review, but since an Order on Review has already been entered the current pleading must be considered as a request for reconsideration which is governed by UTAH CODE ANN. §63-46b-13 and would be barred by the provision of subsection (1)(a) that:

Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section 63-46b-12 is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested.

14. Petitioner would not be entitled to reconsideration, even if otherwise available, since it did not request the same within 20 days from November 12, 1998. However, reconsideration would not lie in this case under any circumstance since reconsideration would only lie if agency review of the order of the Division had not been available. In this case agency review was both available and taken advantage of by Petitioner.

15. As is also the situation in the other cases being handled by Petitioner's attorney

before this tribunal, an allegation is made that Petitioner's LRF claim is somehow protected by the "Savings Statute", UTAH CODE ANN. §78-12-40, and therefore entitled to consideration on its merits. This proposition has previously been discussed in depth and rejected in *BMC West Building Products*, DOPL Case No. LRF-1998-1104-01 (Order on Review entered February 11, 1999). Since there is no valid appeal before the Executive Director in this matter there is no need for a discussion herein of why the savings statute would be inapplicable.

16. The attempt to mislead the Executive Director in this matter through apparently brazen misrepresentations and outright falsehoods is more upsetting than Petitioner's manifestation of a complete and utter disregard for law, rules and procedure. In its Request for Agency Review dated October 21, 1998, Petitioner's attorney alleged that Petitioner's LRF claim had been delayed in filing beyond the statutory period due to the defaulting builder's bankruptcy filing. In this case brought on by Petitioner's filing dated December 16, 1998 and again captioned "Request for Agency Review" Petitioner's attorney claims that Petitioner:

... obtained a default judgment against the contractor, but failed to file its claim with the residence lien recovery fund within 120 days of the obtaining its (*sic*) default judgment. In an attempt to rectify this problem, claimant had said default judgment set aside, then renewed and refiled its claim with the residence lien recovery fund.

17. Assuming that the contents of Petitioner's original filing was correct and honestly presented, then this second filing is at best careless, reckless and in utter disregard for the truthfulness of the allegations being made to this tribunal. Unless Petitioner's claim was released from the automatic stay of the Bankruptcy Court, of which no allegation was submitted, Petitioner would have been in violation of federal law in pursuing two judgments against the defaulting builder on the same cause of action in opposition to the order of the Bankruptcy Court.

18. Petitioner's attempted appeal in this matter does not include a copy of the alleged

denial order entered upon its allegedly refiled LRF claim with the Division. Without documentation having been submitted by Petitioner, the Executive Director must accept the evidence of the Division's files that no such refile of an LRF claim was ever made and that Petitioner is attempting to foist yet another falsehood upon the Executive Director in an attempt to collect upon a barred claim.

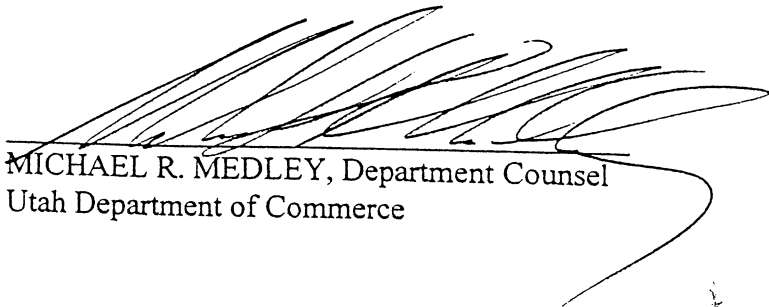
19. The kindest observation that can be entertained of the behavior of Petitioner and its attorney in this matter is that Petitioner's attorney was perhaps merely inexcusably negligent in failing to review or refer to his file in this case rather than being intentionally deceptive. However, this is a matter for consideration before a different forum and has no bearing upon the decision in this case.

20. Petitioner has not filed an appeal in this case upon which the Executive Director might exercise jurisdiction and upon which relief might be granted, and it is therefore necessary that the Executive Director adopt the holding in *Varian-Eimac, Inc. v. Lamoreaux*, 767 P.2d 569 (Utah App. 1989): "When a matter is outside the court's jurisdiction it retains only the authority to dismiss the action."

RECOMMENDED ORDER

ORDERED that the request for agency review of Hansen Insulation, Inc. must be and is hereby dismissed.

Dated this the 17th day of February, 1999.



MICHAEL R. MEDLEY, Department Counsel
Utah Department of Commerce

BEFORE THE
DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE REQUEST
FOR AGENCY REVIEW OF
HANSEN INSULATION, INC.

:
:
:
:

ORDER ON REVIEW

Case No. LRF-1998-0615-01

INTRODUCTION

This matter comes before the Executive Director on the request of the Petitioner, Hansen Insulation, Inc. (hereafter "Petitioner"), for agency review of the denial of its lien recovery fund claim by the Division of Occupational and Professional Licensing (hereafter "Division").

STATUTES OR RULES PERMITTING OR REQUIRING REVIEW

Agency review of the Division's decision is conducted pursuant to Section 63-46b-12, Utah Code Annotated, and Rule R151-46b-12 of the Utah Administrative Code.

ISSUES REVIEWED

1. Whether Petitioner filed a claim upon which recovery could be granted.

FINDINGS OF FACT

1. On September 28, 1998 the Division entered its order denying the claim made by Petitioner upon the lien recovery fund on the basis that its claim was not filed until well after the statutory filing period had expired.

2. Petitioner filed a timely request for agency review in which it argues that Petitioner did not have a claim within the meaning and intent of the statute until it had received all of the documentation from the homeowner necessary to file a claim. Petitioner further alleged that to require a subcontractor to file a claim within 120 days of the contractor filing bankruptcy is arbitrary, capricious, unreasonable and unrealistic.

CONCLUSIONS OF LAW

1. The statutory requirements for filing a claim against the lien recovery fund are set out in the *Utah Residence Lien Restriction and Lien Recovery Fund Act* (hereafter "Act"), which provides in UTAH CODE ANN. §38-11-204 that:

(1) To claim recovery from the fund a person shall:

(a) meet the requirements of either Subsection (3) or (4);

....

(2) To recover from the fund, the application required by Subsection (1) shall be filed no later than 120 days:

(a) from the date the judgment required by Subsection (3)(c) is entered;

(b) if the claimant is precluded from obtaining a judgment because the person described in Subsection (3)(b) filed bankruptcy, from the date the person filed bankruptcy; or

(c) if a laborer, the date the laborer completed the laborer's qualified services.

(3) To recover from the fund, regardless of whether the residence is occupied by the owner, a subsequent owner, or the owner or subsequent owner's tenant or lessee, a qualified beneficiary shall establish that:

....

(b) the owner has paid in full the original contractor licensed or exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, real estate developer, or both, under Subsection (3)(a)(i) or (ii) with whom the owner has a written contract **in accordance with the written contract** and any amendments to the contract, **and:**

(i) **the original contractor** or real estate developer licensed or exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, subsequently **failed to pay a qualified beneficiary who is entitled to payment under an agreement with that original contractor** or real estate developer licensed or exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, **for services performed or materials supplied by the qualified beneficiary;**

(ii) **a subcontractor who contracts with the original contractor** or real estate developer licensed or exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, **failed to pay a qualified beneficiary who is entitled to payment under an agreement with that subcontractor or supplier; or**

(iii) **a subcontractor** who contracts with a subcontractor or supplier **failed to pay a qualified beneficiary who is entitled to payment under an agreement with that subcontractor or supplier;** (Emphasis added).

2. In the case at bar Petitioner alleges that it was unable to file a claim within 120 days of the original contractor and non-paying party filing bankruptcy as required by the Act in §38-11-204(2)(b). According to the facts set out in Petitioner's appeal, Petitioner first became aware on January 12, 1998 that the non-paying party had filed bankruptcy on December 9, 1997. Unaware of the bankruptcy filing, Petitioner had previously filed suit against the non-paying party and the owner of the home on which Petitioner claimed a lien. Petitioner further asserts that it received documentation from the homeowner supporting an entitlement to protection under the lien recovery fund on March 20, 1998, at which time Petitioner released its lien against the property. However, Petitioner did not obtain an affidavit from the owner that the owner occupied the home until after May 13, 1998.

3. Petitioner alleges that the information and documentation required for the filing of a claim under the Act are not readily available to a subcontractor and that:

Until the sub-contractor has obtained from the homeowner all of the documentation proving that the homeowner is entitled to relief under the Lien Recovery Act, the subcontractor has no claim against the Fund for recovery.

4. Even if Petitioner's above stated assertion was a correct statement of the requirements for filing a claim, the time-line furnished by Petitioner shows that the necessary documentation from the homeowner to support a claim application was given to Petitioner on March 20, 1998, some nineteen days before the expiration of the time for the filing of a claim. Although Petitioner argues that it did not get the homeowner's affidavit until after May 13, 1998, no explanation is given for this late receipt or why Petitioner released its lien on March 20, 1998 if the documentation furnished it on that date was incomplete.

5. The Division rules provide for the documentation required to support a claim against the lien recovery fund and alternative forms of acceptable proof. The rules further contains a catch-all savings provision in UTAH ADMIN. R156-38-204a(9) which provides that:

In claims in which the presiding officer determines that the claimant has made a reasonable but unsuccessful effort to produce all documentation specified under this rule to satisfy any requirement to recover from the fund, the presiding officer may elect to accept the evidence submitted by the claimant if the requirements to recover from the fund can be established by that evidence.

6. There might be an excuse for a claimant being unable to produce and submit all of the necessary documentation to support an application for payment from the lien recovery fund within 120 days, but there is no acceptable excuse for failing to file the claim within the statutory period. The filing requirements as established in the Act and implemented in the Division rules are neither overly onerous nor are they arbitrary, capricious, unreasonable and unrealistic as

claimed by Petitioner.


7. The Executive Director has previously ruled the language contained in UTAH CODE ANN. §38-11-204(2) that in order to "... recover from the fund, the application ... **shall** be filed **no later than** 120 days (emphasis added)" from the date the non-paying party files bankruptcy is clearly and unequivocally jurisdictional and nothing is raised in this matter which would either alter this opinion or require further consideration of this issue.

ORDER

The Executive Director of the Department of Commerce having made the above Findings of Fact and Conclusions of Law, it is, therefore

ORDERED that the determination of the Division of Occupational and Professional Licensing properly denied the untimely claim against the lien recovery fund filed by Hansen Insulation, Inc. more than 120 days after the original contractor and non-paying party filed for bankruptcy protection.

SO ORDERED this the 12th day of November, 1998.



DOUGLAS C. BORBA, Executive Director
Utah Department of Commerce

NOTICE OF RIGHT TO APPEAL

Judicial review of this Order may be obtained by filing a Petition for Review with the District Court within 30 days after the issuance of this Order on Review. Any Petition for Review must comply with the requirements of Sections 63-46b-14 and 63-46b-15, Utah Code Annotated.

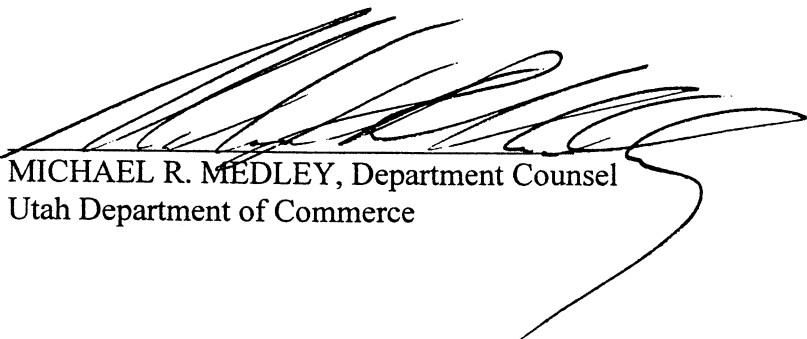
CERTIFICATE OF MAILING

I certify that on the 12 day of November, 1998, the undersigned mailed a true and correct copy of the foregoing Order on Review by certified mail, properly addressed, postage prepaid, to:

Howard Chuntz, Esq.
Attorney at Law
1149 West Center Street
Orem UT 84057
ATTORNEY FOR HANSEN INSULATION, INC.

and caused a copy to be hand-delivered to:

J. Craig Jackson, Director
Division of Occupational and Professional Licensing
160 East 300 South
Salt Lake City, Utah 84111



MICHAEL R. MEDLEY, Department Counsel
Utah Department of Commerce

135969

Lara Maynor
DATE SERVED 1600 1-7-99
DEPUTY *[Signature]*
CONSTABLE A. R. FERNLUND 374-8018

Howard Chuntz, No. 4208
Attorney for Petitioner
1149 West Center Street
Orem, Utah 84057
Telephone: (801) 222-9700

IN THE FOURTH JUDICIAL DISTRICT COURT
COUNTY OF UTAH, STATE OF UTAH

HANSEN INSULATION, INC.,

Plaintiff,

SUMMONS

v.

DIVISION OF OCCUPATIONAL &
PROFESSIONAL LICENSING, JOHN
ALLEN, ROBERT WARREN
CONSTRUCTION, and DOES 1 through
25,

Civil No. _____

Defendants.

_____/

THE STATE OF UTAH TO THE ABOVE-NAMED DEFENDANT:

You are hereby summoned and required to file with the Clerk of the above Court at 125 North 100 West, Provo, Utah 84603, a written answer to the attached Petition for Judicial Review and to serve upon or mail to the plaintiff's attorney, at the address shown above, a copy of your answer within twenty days after service of this Summons upon you.

If you fail to so answer, judgment by default will be taken against you for the relief demanded in the Petition which has been filed with the Clerk of the above Court and a copy of which is attached and herewith served upon you.

DATED December 23, 1998.

Serve defendant at:
Division of Occupational &
Professional Licensing
J. Craig Jackson, Director
160 East 300 South, SLC, UT 84111

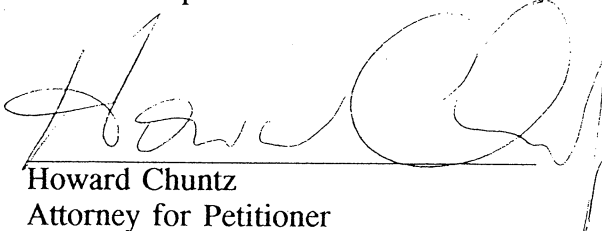
[Signature]
Howard Chuntz
Attorney for Plaintiff

to the agency action are those named in the caption to this matter, as well as the Division.

6. Petitioner filed a Lien Recovery Fund Claim June 15, 1998.
7. The Division denied petitioner's claim on September 28, 1998.
8. Petitioner filed a Request for Agency Review on or about October 21, 1998.
9. The Division denied petitioner's claim on its Order on Review dated November 12, 1998.
10. Petitioner is entitled to relief for reasons more specifically set forth in his Request for Agency Review submitted herewith as Exhibit "B".

WHEREFORE, petitioner prays that the Division's denial of its claim be reversed and that the Division be required to pay petitioner the sums requested in its claim.

DATED December 11, 1998.


Howard Chuntz
Attorney for Petitioner

re pet

TONY R. PATTERSON #5128
Assistant Attorney General
JAN GRAHAM #1231
Attorney General
Heber M. Wells Bldg.
160 East 300 South, 5th Floor
Salt Lake City, Utah 84111
Telephone: (801) 366-0310

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

HANSEN INSULATION, INC.,)	
)	
Petitioner,)	ANSWER OF THE DIVISION OF
)	OCCUPATIONAL & PROFESSIONAL
vs.)	LICENSING
)	
STATE OF UTAH DIVISION OF)	
OCCUPATIONAL AND PROFESSIONAL)	
LICENSING, JOHN ALLEN, ROBERT)	Civil No. 980406587
WARREN CONSTRUCTION, and)	
DOES 1 THROUGH 25,)	Judge HARDING
)	
Respondents.)	

The State of Utah Division of Occupational and Professional Licensing, Respondent, through Tony R. Patterson, Assistant Attorney General, answers the Petition for Judicial Review as follows:

FIRST DEFENSE

1. The Petitioner failed to file its claim with the Residence Lien Restriction and Lien Recovery Fund (hereinafter Fund) within 120 days of the bankruptcy filing as required by Utah Code Annotated Section 38-11-204(2)(b). Petitioner filed its Application with the Division of Occupational and Professional Licensing (hereinafter Division) on June 15, 1998, [See Exhibit "A"]. Petitioner stated in its Application to the Fund that the non-paying contractor, Robert Warren, filed for Bankruptcy protection on December 9, 1997, in case no. 97-31433JHA United States Bankruptcy Court, District of Utah, Salt Lake Department. Petitioner intended the Fund to rely upon that bankruptcy case in considering its application. In an effort to accomplish that intent, the Petitioner attached a copy of a Notice of Commencement of Bankruptcy to its application. See Exhibit "B"

2. An Affidavit, Certification and Release Authorization was filed by Petitioner with its Application affirming that "the information contained in this application and the supporting document(s) are free from fraud, misrepresentation, or omission of material fact."

3. Petitioner is precluded from having the Fund consider its application because Petitioner filed its claim 188

days after the non-paying party filed bankruptcy, sixty-eight (68) days past the 120 days stated by law.

4. The Department of Commerce (hereinafter Department), and Division lacked jurisdiction over the application due to the untimely filing.

5. The court lacks jurisdiction over the application because the application was untimely filed.

SECOND DEFENSE

6. Petitioner failed to file its request for agency review with the Department within thirty days of the date the Division issued its order. The Department correctly upheld the Division's order that Petitioner had filed its application untimely and therefore jurisdiction could not be exercised over the matter.

THIRD DEFENSE

7. Petitioner is precluded from raising claims of arbitrary, capricious, unreasonable, and unrealistic as it was not raised before the Division. Petitioner first raised the issues on Agency Review. However, the Department did not have the jurisdiction due to the untimely filing of the request for agency review and the untimely filing of the application. The court lacks jurisdiction in this matter due to the untimely

filing of the application.

FOURTH DEFENSE

8. The statutory requirement to file an application found in 38-11-204(2) is jurisdictional. Petitioner failed to file its claim in the time required by law and is therefore barred from recovering from the Fund.

FIFTH DEFENSE

5. Paragraphs 1,2,3,4,6, and 7 of the Petition are admitted.

6. Paragraph 5 of the Petition is denied. The Division and the Petitioner were the only parties to the action below.

7. Paragraph 8 is denied as the Request for Agency Review was filed with the Department of Commerce on October 30, 1998.

9. Paragraph 9 of the Petition is denied. It is admitted that the Department of Commerce, in an order dated November 12, 1998, denied the Petitioner's request for Agency Review and upheld the Division's decision of denying the claim on the basis that the Petitioner had failed to file its application with the fund within the 120 days from the date it received a judgment.

10. Paragraph 10 of the Petition is denied.

Respondent failed to provide a copy of "Exhibit B" to the Petition.

SIXTH DEFENSE

11. The Petitioner has failed to establish, by the preponderance of the evidence, that the application meets all of the requirements of Utah Code Annotated Section 38-11-204.

SEVENTH DEFENSE

12. The Petition fails to comply with the provisions of Utah Code Annotated Section 63-46b-15(2) (a) (vi) - (viii).

EIGHTH DEFENSE


13. The Complaint fails to state a claim upon which relief can be granted.

NINTH DEFENSE

14. The Division denies each and every allegation of the Petition that they have not heretofore specifically admitted or denied.

WHEREFORE, the Division requests that the court affirm the decision of the Division and the Department by dismissing this action with prejudice for lack of jurisdiction based upon the Petitioner's failure to file the application with the Fund in a timely matter. Additional, for an order denying the application based upon the defenses raised by the Defendant herein.

DATED this 21 day of January, 1999.


~~TONY R. PATTERSON~~
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 22 day of January, 1999, I mailed a true and exact copy of the foregoing Answer of the State of Utah, postage prepaid, to the following:

Howard Chuntz
Attorney for Petitioner
1149 West Center Street
Orem, Utah 84057

